Supreme Court, U.S.
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No. 09-767

IN THE
Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

U.S. CUSTOMS AND BORDER PROTECTION,
U.S. INTERNATIONAL TRADE COMMISSION,
TIMKEN U.S. CORPORATION, UNITED STATES,
JAYSON P. AHERN, ACTING COMMISSIONER,
U.S. CUSTOMS AND BORDER PROTECTION,
AND SHARA L. ARANOFF, CHAIRMAN,
U.S. INTERNATIONAL TRADE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GIORGIO FOODS, INC. AND PS CHEZ SIDNEY, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF GIORGIO FOODS, INC. AND PS CHEZ SIDNEY, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Giorgio Foods, Inc. ("Giorgio") and PS Chez Sidney, LLC ("Chez Sidney") respectfully submit this brief as *amici curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

Giorgio and Chez Sidney, both small businesses, are domestic producers of products covered by a series of antidumping duty orders. Neither is affiliated with a foreign producer of the merchandise covered by those orders. Both actively assisted the petitioner and/or government agencies in the antidumping investigations and in obtaining the antidumping duty orders, and the government treated both companies as part of the domestic industries that were injured by dumped imports. Nonetheless, under the Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, 114 Stat. 1549A-72 (previously codified at 19 U.S.C. § 1675c) ("CDSOA"), both companies were denied distributions of antidumping duties collected under those orders solely because, by compulsion of law, they expressed the

1. Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their shareholders, members, or counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

viewpoint that they took no position regarding, or opposed, the petitions that preceded the antidumping orders, in response to U.S. International Trade Commission ("ITC") questionnaires issued years before the CDSOA was enacted. Giorgio and Chez Sidney were the first domestic producers to challenge the constitutionality of the CDSOA petition support eligibility condition, and both have cases pending in the lower courts.

BACKGROUND

1. Giorgio

Giorgio, headquartered in Temple, Pennsylvania, is the single largest U.S. domestic producer of preserved mushrooms. In 1998, the *ad hoc* Coalition for Fair Preserved Mushroom Trade, comprising seven domestic producers, filed petitions for antidumping duties against imports of preserved mushrooms from four countries.[2] The members of the coalition represented a sufficient portion of the domestic mushroom industry to meet the standing requirements for bringing antidumping petitions. Although Giorgio elected not to join that coalition formally or publicly, it significantly assisted the coalition in its efforts to file and prosecute the petitions, and thereby supported each of the four mushroom antidumping investigations. Giorgio contributed more

2. The process by which a petitioner commences a petition for the imposition of antidumping duties and the procedures by which the Department of Commerce and the ITC evaluate the petition are fully explained in the Petition for Certiorari. Pet. 4–6; *see also United States v. Eurodif, S.A.*, 129 S. Ct. 878, 883–84 (2009) (describing generally the antidumping petition and investigation process).

than $1 million to the legal fees incurred by the coalition—more than any member of the coalition. Giorgio provided confidential business data that enabled the coalition to prepare the petition and to prosecute the case. Giorgio hosted ITC investigators for a field visit to a domestic producer. And Giorgio provided data in its responses to ITC questionnaires that enabled the ITC to conclude that the domestic industry as a whole—which it defined so as to include Giorgio—was injured by reason of dumped imports from all four countries. U.S. INT'L TRADE COMM'N, CERTAIN PRESERVED MUSHROOMS FROM CHINA, INDIA, AND INDONESIA, Inv. No. 731-TA-777-779 (Final), USITC Pub. No. 3159, at 5, 21 (Feb. 1999) *available at* http://www.usitc.gov/publications/701_731/pub3159.pdf; U.S. INT'L TRADE COMM'N, CERTAIN PRESERVED MUSHROOMS FROM CHILE, Inv. No. 731-TA-776 (Final), USITC Pub. No. 3144, at 8, 24 (Nov. 1998) *available at* http://www.usitc.gov/publications/701_731/pub3144.pdf.

In response to the ITC's investigative questionnaires, however, Giorgio indicated that it took no position with respect to the petitions concerning Chile, China, and Indonesia, and that it opposed the petition concerning India. Giorgio declined to check the "support" box for business reasons unrelated to the injurious impact it believed imports were having on its business. For example, a Giorgio affiliate imported preserved mushrooms from Indonesia to Europe, and thus Giorgio did not want its support of the petitioner to be public so as potentially to jeopardize that business relationship. Giorgio was not affiliated with any of the foreign producers covered by the antidumping orders.

The Department of Commerce ("Commerce") entered antidumping duty orders against preserved mushrooms from Chile on December 2, 1998 and from China, India, and Indonesia on February 19, 1999. After the CDSOA was enacted in 2000, Giorgio informed the ITC of the substantial assistance it provided to the petitioner in support of the preserved mushroom petitions. The ITC nonetheless determined that Giorgio was ineligible for CDSOA distributions exclusively on speech-based grounds, because Giorgio had not checked the "support" box in its responses to the ITC's final phase questionnaires in the injury investigations. To date, for Fiscal Years 2001-2009, Giorgio has been denied over $8 million in CDSOA distributions, solely because it did not publicly express its support of the antidumping petitions. Its domestic competitors all have received distributions.

On May 23, 2003, Giorgio filed suit in the Court of International Trade ("CIT") challenging the constitutionality of the CDSOA's petition support requirement. *See Giorgio Foods, Inc. v. United States*, Court No. 03-00286 (Ct. Int'l Trade). The CIT stayed Giorgio's case pending resolution of *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, Court No. 02-00635 (Ct. Int'l Trade), discussed below.

2. Chez Sidney

Chez Sidney was a domestic producer of crawfish, with a processing facility in Catahoula, St. Martin Parish, Louisiana. It was not affiliated with any foreign crawfish producer. It suffered economic harm from dumped imports of crawfish from China. In 1996, with the support of the Louisiana Department of Agriculture, an *ad hoc* Crawfish Processors Alliance filed an antidumping petition against

crawfish from China. No domestic producer was a petitioner. In its October 7, 1996 response to the ITC's preliminary phase questionnaire in that proceeding, Chez Sidney checked the box indicating its "support" for the antidumping petition. In its May 5, 1997 questionnaire response during the final phase of the ITC's injury investigation, Chez Sidney checked the box "take no position" on the petition, without explanation, and returned the questionnaire unsigned. The ITC determined the last-filed questionnaire response to be controlling for CDSOA eligibility purposes, and denied Chez Sidney's request to be added to the list of eligible domestic producers. Customs has determined that Chez Sidney would have received over $1.1 million in CDSOA distributions but for the unconstitutional petition support requirement. For Fiscal Years 2002–2004, eligible domestic crawfish processors each received an average annual CDSOA distribution of more than $300,000.[3] These huge subsidies enabled Chez Sidney's competitors to underbid it both in purchasing crawfish and in selling processed meat, which resulted in lost business. The continued dumping of Chinese crawfish and the large CDSOA distributions that have been paid

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3. *See* U.S. CUSTOMS & BORDER PROTECTION, ANNUAL REPORT (FINAL) CDSOA FY 2002 DISBURSEMENTS, *available at* http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_02/; U.S. CUSTOMS & BORDER PROTECTION, CDSOA FY 2003 FINAL ANNUAL REPORT, *available at* http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_03/cdsoafy03_annual_report.xml; U.S. CUSTOMS & BORDER PROTECTION, FY 2004 ANNUAL DISBURSEMENT REPORT, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_04/fy2004_annual/annual_disbursement.ctt/annual_disbursement.pdf.

to Chez Sidney's domestic competitors since 2002 combined to drive Chez Sidney out of the crawfish business in 2004. In 2006, it was forced to file a chapter 11 reorganization proceeding with its parent company and sell its physical assets.

On October 2, 2002, Chez Sidney challenged the constitutionality of the CDSOA under the First and Fifth Amendments in the Court of International Trade, and the court granted Chez Sidney partial summary judgment on July 13, 2006. *PS Chez Sidney, LLC v. U.S. Int'l Trade Comm'n*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006). The court determined that the CDSOA differentially rewards or burdens speech on the basis of viewpoint and that it is therefore subject to strict scrutiny. *Id.* at 1355–56. The court found that, contrary to the government's arguments, questionnaire responses regarding whether a producer supports a petition are statements of opinion, not fact, and that a producer might oppose a petition for numerous reasons. *Id.* at 1357. The court specifically found that whether a producer indicates support for a petition is not a reliable proxy for whether that producer has been harmed by the alleged dumping. *Id.* The court also noted that, if the government's interest was in fact to allocate subsidies to the producers most harmed by dumping, other means were available for assessing injury. *Id.* Accordingly, the court held that the CDSOA could not pass strict scrutiny and held it unconstitutional under the First Amendment. *Id.* at 1359.

The United States appealed the *Chez Sidney* decision to the Federal Circuit; that appeal has been stayed pending the outcome of this case.

3. The Decisions Below

Petitioner SKF USA Inc. ("SKF") filed the present case in the CIT in 2005 and, in September 2006, the CIT issued its decision holding that the CDSOA violates the equal protection guarantee of the Fifth Amendment by discriminating among domestic producers without a rational basis. Pet. App. 145a–146a.

A divided panel of the Federal Circuit reversed. The court summarily rejected SKF's arguments that the CDSOA violated the Fifth Amendment, Pet. App. 51a–52a, and instead focused in detail on SKF's First Amendment challenge. The court of appeals rejected the government's claim that the CDSOA's support-eligibility requirement served as a proxy to identify the domestic producers that were injured by dumping; the court instead concluded that Congress enacted the CDSOA "to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." *Id.* at. 33a. The majority also held that the CDSOA's support-eligibility requirement was akin to the regulation of commercial speech, because Congress, in effect, had contracted for assistance in its enforcement efforts. *Id.* at 40a. Finally, the court held that the Act satisfied the requirements applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). Pet. App. 41a–45a.

Judge Linn dissented. Pet. App. 53a–100a. He explained that the CDSOA on its face discriminated among producers based on the content and viewpoint

of their answers to ITC's questionnaire by making eligibility for CDSOA distributions dependent solely on the producer's expression of support for the antidumping petition. *Id.* at 89a. Because the CDSOA discriminated among speakers on the basis of their viewpoints, Judge Linn concluded that the CDSOA was subject to strict scrutiny, and that the Act failed that standard of review. *Id.* at 94a.

ARGUMENT

This Court's review is warranted because a divided panel of the Federal Circuit upheld the constitutionality of an Act that facially discriminates on the basis of a citizen's viewpoint concerning whether the government should undertake an enforcement action against foreign imports. That speech concerns a matter of obvious political concern, and yet the Federal Circuit reached the remarkable conclusion that the Act escaped strict scrutiny because of a hypothesized statutory purpose to reward support of government investigation efforts. A questionnaire that requires a citizen to express his view on whether the government should take prosecutorial action can never be the basis of government allocation of public benefits.

The reasoning of the majority is manifestly wrong, and casts aside decades of this Court's settled First Amendment jurisprudence. Moreover, despite the Act's prospective repeal, the Act continues to govern the ongoing entitlement of domestic producers to many millions of dollars over many years to come, and chills the speech of companies denied valuable benefits based on the viewpoint they expressed on a policy issue in response to a government questionnaire.

I. The CDSOA Facially Violates the First Amendment By Conditioning Eligibility for a Government Benefit Upon a Citizen's Speech

A. The CDSOA Eligibility Scheme Facially Discriminates on the Basis of a Producer's Expressed Viewpoint

The CDSOA on its face grants subsidies based on a domestic producer's expression of support for a specific governmental enforcement action—whether additional duties should be imposed on particular imports. That facially discriminatory treatment based exclusively on the content of speech is subject to strict scrutiny. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, No. 08-205, slip op. at 23–24 (S. Ct. Jan. 21, 2010);*United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Because the government cannot claim (and has not claimed) that the CDSOA survives strict scrutiny, the Act is unconstitutional.

The majority below acknowledged the obvious—that responses to ITC questionnaires are "protected First Amendment activity"—Pet. App. 38a—but nonetheless held that the Act's "language . . . is easily susceptible to a construction that rewards actions (litigation support)." *Id.* at 36a. But the Act unambiguously ties eligibility only to the expression of speech, *i.e.*, an expression of support for an antidumping petition. Giorgio took concrete *actions* to support the mushroom petitions, but is ineligible for CDSOA distributions solely

because of the *viewpoint* of its speech. If the government tied public benefits to a statement of support for the President, no one would suggest that the statute could be saved by construing it to merely "reward actions (political support)."

Nor is it relevant that that the Act does not "ban speech entirely," because producers are free to answer the questionnaire however they want and can express their views outside the context of the questionnaire. *Id.* at 28a. This Court's precedents do not distinguish between content-based *prohibitions* on speech and content-based *discrimination* against speech. *Simon & Schuster*, 502 U.S. at 115 (striking down a statute that did not prohibit speech because it "impose[d] a financial burden on speakers because of the content of their speech"); *accord Citizens United*, No. 08-205, slip op. at 23 ("Laws that burden political speech" are subject to strict scrutiny.). The CDSOA's support-based eligibility criterion not only discriminates based on the content of speech, it does so in the most pernicious way: based on the speaker's viewpoint. The Act subsidizes only those producers that voice support for the imposition of antidumping duties on particular imports, while denying subsidies to producers that decline to indicate support.

In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court struck down a California law that required veterans to affirm that they did not support the overthrow of the U.S. government before they could claim a tax exemption available to veterans. The Court explained that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize

them for such speech." *Id.* at 518. The Court similarly has observed that "[t]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 828–29 (citations omitted); *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."); *accord Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983); *Miami Herald Publ'g Co. v. Tornilo*, 418 U.S. 241, 256 (1974); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Those well-settled precedents doom the constitutionality of the Act.

As Judge Linn explained, Pet. App. 91a–92a, the CDSOA also violates the First Amendment because it discriminates based on viewpoint in a limited public forum—in this case the ITC proceeding—that the government itself establishes. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Having established the ITC proceeding as a forum in which views on trade petitions are to be expressed, both to the public and to the government, Congress may not impose viewpoint-based burdens absent a compelling governmental interest and a narrowly tailored restriction. *Rosenberger*, 515 U.S. at 829. By paying only those domestic producers who indicate in questionnaire

responses that they support the petition, the government distorts the impartial system it has created for adjudicating unfair trade disputes, impermissibly influencing the views domestic producers express on petitions and thereby distorting both the ITC's assessment of injury and the independent statutory requirement that petitions must enjoy support from a majority of the affected industry. *Citizens United*, No. 08-205, slip op. at 28 (ban on expenditures for political speech based on identity of speaker interfered with "open marketplace" of ideas); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 534 (2001) (rejecting congressional curbs placed on Legal Aid lawyers, which "distort the legal system by altering the attorneys' traditional role").

B. The Court of Appeals' Reasoning Is Unpersuasive

The majority offered several rationales to support the constitutionality of the CDSOA. First, after rejecting the arguments advanced by the government, the court reasoned that the Act was saved by a hypothetical benign purpose to reward producers that assisted the government's enforcement efforts. Pet. App. 33a. Second, the court held that the Act's support-eligibility requirement could be reviewed under commercial speech doctrine. *Id.* at 40a. Third, the court attempted to draw support from statutes that award a bounty to individuals who support the government's enforcement efforts. *Id.* at 41a–43a. Fourth, the court suggested, but did not decide, that the Act merely promoted a

government-funded message. *Id.* at 40a n.29. None of those reasons withstands scrutiny.[4]

1. The majority erred in holding the statute was constitutional because Congress might have intended in the CDSOA to reward producers that provide assistance to the government in conducting antidumping investigations. Pet. App. 32a–33a. Because the Act is facially content-based and viewpoint discriminatory, a benign purpose is beside the point. Plaintiffs challenging content-based regulations need not adduce "evidence of an improper censorial motive." *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Viewpoint discrimination does not trigger the First Amendment "only when the legislature intends to suppress certain ideas . . . . [O]ur cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the Amendment.'" *Simon & Schuster*, 502 U.S. at 117 (citations omitted); *accord Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

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4. The court of appeals correctly rejected as "simply implausible" the government's argument that the support-eligibility requirement was a constitutionally legitimate "surrogate for injury" to identify the domestic producers that were harmed by dumping. Pet. App. 30a. Even were the Act's petition support requirement a "surrogate for injury," that fact would not save this facially discriminatory statute. Indeed, the government's "surrogate for injury" defense necessarily presumes that Congress could have achieved its asserted objective without viewpoint discrimination on whether particular government action was supported, *i.e.*, by simply asking producers on the questionnaire whether they were injured by dumped imports.

In any event, the Act's purpose is *not* to reward producers that assist the government's efforts in antidumping enforcement. A producer's mere statement of support on a questionnaire bears no necessary relationship to the producer's actual assistance to the government. A producer can check the box indicating support for the petition without providing *any* actual assistance to the government. Conversely, as in Giorgio's case, a producer can express no position on a questionnaire and yet provide an extraordinary level of assistance. Also, the Act's very structure negates the purpose the majority hypothesized. Distributions are paid relative to "qualifying expenditures," defined to include producer spending incurred only after an antidumping order is obtained. 19 U.S.C. § 1675c(d)(3). The Act hardly can reward conduct necessary to obtain an order when it pays benefits based on conduct occurring exclusively after the order is obtained.

Nor, as the CIT found in *Chez Sidney*, 442 F. Supp. 2d at 1357, can a producer's response regarding its support for a petition be used as a proxy for either the amount of assistance provided by the producer or the extent to which the producer was harmed by the dumping. Producers can oppose petitions, or take no position, for numerous reasons: because they fear retaliation in their export markets, because they believe in free trade, or because they believe a petition to lack merit, among others. Giorgio, for instance, declined to support the preserved mushroom petitions primarily out of concern for business relationships that were unrelated to the domestic market. Whatever a

producer's reason, the First Amendment allows the viewpoint to be expressed without penalty.[5]

2. The majority justified its application of this Court's commercial speech cases because it equated awarding CDSOA distributions based on an expression of support with "contracting with [parties] to assist in the performance of a government function." Pet. App. 40a. That analysis is as tortured and wrong as saying that tying benefits to a requirement that a citizen support the war in Afghanistan is like contracting with citizens to assist in the government's war efforts. The CDSOA is not a contract, and it is not based on assistance. It is a subsidy tied to political speech. There is simply nothing commercial about a statutory requirement that domestic producers express their opinion about a government enforcement effort, and there is likewise nothing commercial about tying a public benefit to that speech. Commercial speech is narrowly defined as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson*, 557 U.S. at 561; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that speech by businesses on matters of public concern is not "commercial speech," even if the business has a pecuniary interest in the issue).

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5. The majority also erred in asserting (Pet. App. 48a) that domestic producers "typically" oppose petitions because "the domestic industry participant is owned by a foreign company charged with dumping." Giorgio and Chez Sidney have no foreign affiliates with an interest in the relevant petitions.

3. The majority also erred in drawing an analogy to the False Claims Act, 31 U.S.C. § 3729 et seq., which provides a bounty to private parties who assist the government in prosecuting a claim. Pet. App. 43a–44a. As an initial matter, unlike a relator who successfully litigates a suit under the False Claims Act, a producer's mere answer of "support" on a government questionnaire has no relationship to the level of assistance the producer provides to the petitioner. Further, unlike the False Claims Act—in which the relator sues on behalf of the United States—the government's role in an antidumping investigation is that of neutral arbiter, not plaintiff. Thus, whereas the government's interest in a False Claims Act proceeding is always in success of the claim, the government's interest in an antidumping investigation is in the fair resolution of the investigation, even if it does not result in the imposition of duties. *See Chez Sidney*, 442 F. Supp. 2d at 1336–37 ("Determination of injury or its threat in a fair and objective manner is a substantial portion of the ITC's mission.").

In any event, none of the statutes cited by the Federal Circuit condition the payment of a bounty on the content of a party's *speech*. Rather, those statutes reward private parties based on the parties' actions, such as successfully prosecuting litigation or providing information that leads to the recovery of money owed the government. False Claims Act, 31 U.S.C. § 3730(d) (award "depend[s] upon the extent to which the person substantially contributed to the prosecution of the action"); 26 U.S.C. § 7623 (awarding a bounty to whistleblowers who provide information to the IRS depending on "the extent to which the individual

substantially contributed to such action"); 19 U.S.C. § 1619 (payments to persons who provide information leading to the collection of customs duties).

4. Finally, this Court's decisions giving the government leeway to regulate speech under a government-funded program do not support the Act's constitutionality. Pet. App. 40 n.29; Gov't C.A. Br. 12–18. Those decisions are based on the government's interest in deciding how its money is spent, and the recipient's choice to decline the government funding if it does not like the government's message. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). The speech of domestic producers here, however, does not arise out of their *voluntary* participation in a government-funded program. Rather, the viewpoint expression of domestic producers is *required* by the government, *i.e.*, producers are required to answer the questionnaire and specify a position on the government's proposed enforcement action. Gov't C.A. Br. 18 ("[D]omestic producers are required to respond to ITC questionnaires in antidumping investigations.").

Moreover, even if a producer could decline to answer the questionnaire, the statute would still discriminate on the basis of speech by rewarding those producers who were willing to voice the government's preferred viewpoint. And beyond just rewarding compliant producers, the discriminatory distribution of duties injures producers who do not voice support by subsidizing their competitors. In fact, the distribution of subsidies to Chez Sidney's competitors, and the consequent disadvantage to Chez Sidney in the market place, contributed directly to the end of Chez Sidney's crawfish processing business.

The government also never asserts the purported message that it seeks to convey when it makes "benefit payments" to only those domestic producers that expressed support for the government's investigation. Gov't Br. 17. Nor could it, because the questionnaire does not require domestic producers to say, or to refrain from saying, any particular message specified by the government. Rather, the government simply asks domestic producers to state their views on a core political matter—whether the government should take enforcement action against foreign imports.

II. The Court of Appeals' Decision Warrants This Court's Review

A. The CDSOA Governs Distributions of Millions of Dollars in Antidumping Duties for Years to Come

The CDSOA continues to apply to duties collected on goods that entered the United States through September 30, 2007. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). Because the repeal of the Act is prospective only, distributions under the CDSOA will continue for many more years, and the unconstitutional "support" eligibility condition will continue to govern those distributions.

Antidumping duties are not distributed under the CDSOA until they are finally assessed and collected, a process that can take *five years or more* from the date the goods enter the United States. Commerce finally determines antidumping duties retrospectively, through

a nine- to fifteen-month administrative process that does not begin until up to a year after the date of entry. *See* 19 U.S.C. § 1675(a). Commerce's duty determination is then subject to up to three levels of judicial review. Customs collects duties only after Commerce has finally determined what duties are owed and all judicial review has been exhausted. The collection process too can be time-consuming, particularly if Customs must pursue collection actions against importers or their sureties. Customs itself has acknowledged that the distribution of CDSOA payments will be ongoing "for an undetermined period." Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009) (explaining procedures for continued distribution of CDSOA funds).

The Act's continuing, and in some cases increasing, impact is demonstrated by Giorgio's predicament. Customs has informed Giorgio that the questionnaire support condition has operated to deprive Giorgio of the following increasing amounts of CDSOA distributions each year:

Distribution Date	Fiscal Year	Amount
Dec. 2006	2005	$ 481,732.10
Dec. 2007	2006	$ 510,175.99
Dec. 2008	2007	$ 2,189,730.10
Dec. 2009	2008	$ 2,736,167.72

And distributions will continue into the foreseeable future. Additionally, Giorgio is covered by a class action filed on April 7, 2009, seeking to recover from various surety companies over $ 700 million in antidumping

duties that remain uncollected on just four imported products. *Sioux Honey Ass'n v. Harford Fire Ins. Co.*, Ct. No. 09-1141 (Ct. Int'l Trade). If the litigation is successful, the moneys collected will be distributed under the CDSOA. That case alone highlights the large amount of duties potentially still distributable.

In addition to its ongoing significance for duties to be collected in the future, the CDSOA also continues to have an effect on the distribution of previously collected duties. In response to the litigation concerning the constitutionality of the CDSOA, Customs since Fiscal Year 2005 has withheld from distribution the pro rata share of funds allocable to domestic producers who have filed certifications for distribution but are ineligible for distribution due to the petition support requirement. 74 Fed. Reg. at 25,815. There have been some 41 such cases filed. For example, as noted above, Customs is holding nearly $6 million dollars in CDSOA distributions for Giorgio. For Fiscal Year 2009 alone, Customs is withholding a total of $76 million in disputed CDSOA distributions under litigation.[6] If the Act's petition-support requirement is ultimately found unconstitutional, these funds will be distributed to the producers who were eligible for CDSOA distributions but for the petition support requirement.

Additionally, there is ongoing litigation by producers who were denied CDSOA distributions prior to Fiscal Year 2005. These producers seek to obtain distributions

6. *See* U.S. Customs & Border Protection, FY 2009 CDSOA Annual Disbursement Report, *available at* http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf.

from the Government, and/or to recover their share of distributions paid to other producers who received windfalls due to the CDSOA's unconstitutional support-eligibility requirement. Giorgio, for instance, has claims pending against other domestic producers of preserved mushrooms in the CIT seeking to recover its pro rata share of CDSOA distributions for Fiscal Years 2001–2004. *Giorgio Foods, Inc. v. United States*, Ct. No. 03-00286 (Ct. Int'l Trade). With respect to Chez Sidney, the CIT has affirmed Customs' determination that Chez Sidney would be owed over $1.1 million, which Customs has indicated it would either pay out of future duty collections or recover from other domestic processors who in effect received CDSOA funds that should have been paid to Chez Sidney. *PS Chez Sidney LLC v. U.S. Int'l Trade Comm'n*, 558 F. Supp. 1370, 1375 (Ct. Int'l Trade 2008).

B. The Federal Circuit's Decision Chills Speech Into the Indefinite Future

In addition to the CDSOA's direct, increasing, and consequential financial impact on Giorgio and its competitive position in relation to its domestic competitors that are receiving CDSOA distributions, the Act continues to chill Giorgio's and other producers' political speech because the repeal did not affect the questionnaires. The ITC continues to send domestic producers questionnaires that, under compulsion of law, request producers to express whether they support the government's enforcement actions. In light of the court of appeals' decision, producers are keenly aware that they can be denied valuable government benefits if they do not speak up in support of government action when

responding to these or other government-issued inquiries. Unless this Court corrects the decision below, producers—and their owners and managers—will be wary in responding to future questionnaires from government officials or agencies seeking their viewpoint on public policy issues. Regardless of their actual viewpoint, their responses will be shaped by an understanding that their eligibility for future programs and benefits may be affected if they indicate anything other than support for a proposed action.

C. The Unconstitutionality of the CDSOA Warrants This Court's Review

The court of appeals, with respect to a statute that cannot be reviewed by other circuits, reached the astonishing conclusion that a facially discriminatory penalty on speech was constitutional. That result is an affront to the First Amendment and this Court's precedents. Moreover, because the Act continues to govern ongoing distributions for the indefinite future, it would be unseemly to permit the government to apply a statute that facially discriminates on the basis of speech merely on the say-so of a divided Federal Circuit panel. This Court should decide for itself whether the government's continuing administration of such a large amount of funds is consistent with core values of the First Amendment.

The implications of the court of appeals' reasoning are also disturbing. Stretched to its logical conclusion, the panel's reasoning—that a legislative purpose to assist government enforcement efforts justifies facially discriminatory penalties on speech—could, for example,

support the constitutionality of providing government subsidies to workers who vote for union certification, while denying them to those who vote against, *or vice versa*. Similarly, the Federal Circuit's reasoning suggests that the Department of Defense could condition eligibility for a government contract on a contractor's willingness to sign a statement that it supports the war in Afghanistan. No such scheme should survive scrutiny, yet a divided panel of the Federal Circuit held that Congress may condition eligibility for a government subsidy on a domestic producer's expressed approval of a petition. This Court should review that extraordinary holding.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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